

AMENDED IN ASSEMBLY AUGUST 7, 2006

AMENDED IN ASSEMBLY JUNE 21, 2006

AMENDED IN SENATE MAY 26, 2006

AMENDED IN SENATE MAY 17, 2006

AMENDED IN SENATE APRIL 17, 2006

**SENATE BILL**

**No. 1544**

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**Introduced by Senator Migden**

(Coauthor: Assembly Member Goldberg)

February 23, 2006

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An act to add Section 806 to the Evidence Code and to add ~~Sections~~ *Section 686.3* and ~~13519.10~~ to the Penal Code, relating to criminal investigations.

LEGISLATIVE COUNSEL'S DIGEST

SB 1544, as amended, Migden. Criminal investigations: eyewitness identification: lineups.

Existing law does not regulate how law enforcement officials prepare or conduct eyewitness photo or live lineup identifications.

This bill declares legislative intent to require law enforcement to adopt policies and procedures regulating eyewitness lineup identifications so as to ensure a decrease in the number of misidentifications.

This bill would require the Department of Justice *and the Commission on Peace Officer Standards and Training* to develop guidelines ~~which would be required to be adopted by~~ *in conjunction with* all law enforcement agencies, *prosecutors, and defense attorneys, as specified*, in order to ensure the reliability of eyewitness photo and

live identifications, as specified. ~~This bill would also require the Commission on Peace Officer Standards and Training to train all peace officers on the specified regulations to ensure accurate and reliable eyewitness identifications.~~

Existing law allows opinion testimony from expert witnesses to be admitted at trial upon specified showings.

This bill would allow expert testimony regarding the reliability of an eyewitness identification to be admitted at trial *if the defendant makes a specified showing*.

Because this bill requires local agencies to adopt new regulations and to train their employees regarding the regulations, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1     ~~SECTION 1. The Legislature finds and declares the~~
- 2     ~~following:~~
- 3     ~~(a) The goal of a law enforcement criminal investigation is to~~
- 4     ~~find and apprehend the person or persons responsible for~~
- 5     ~~committing a crime.~~
- 6     ~~(b) Eyewitness identification procedure studies indicate that~~
- 7     ~~the criminal justice system can significantly decrease the rate of~~
- 8     ~~erroneous eyewitness identifications by implementing changes to~~
- 9     ~~identification procedures.~~
- 10    ~~(c) A decrease in the number of erroneous eyewitness~~
- 11    ~~identifications will increase public trust in the criminal justice~~
- 12    ~~system, which, in turn, will increase the ability of law~~
- 13    ~~enforcement and prosecutors to convict the guilty and protect our~~
- 14    ~~communities.~~

1 ~~(d) New policies and procedures such as those recommended~~  
2 ~~by the National Institute of Justice are readily available and have~~  
3 ~~proven effective in other jurisdictions.~~

4 ~~(e) Therefore, it is the intent of the Legislature that law~~  
5 ~~enforcement officials establish new policies and procedures~~  
6 ~~similar to those recommended by the National Institute of Justice~~  
7 ~~in order to ensure that eyewitness identification procedures in~~  
8 ~~California minimize the chance of misidentification of a suspect.~~

9 ~~SEC. 2.~~

10 *SECTION 1.* Section 806 is added to the Evidence Code, to  
11 read:

12 806. Consistent with existing law, expert testimony is  
13 admissible regarding factors that affect the reliability of  
14 eyewitness identifications if, upon a showing by the defendant,  
15 the factors are present in the case before the court.

16 ~~SEC. 3.~~

17 *SEC. 2.* Section 686.3 is added to the Penal Code, to read:

18 686.3. (a) *The goal of a law enforcement criminal*  
19 *investigation is to find and apprehend the person or persons*  
20 *responsible for committing a crime.*

21 (b) *A comprehensive body of peer-reviewed studies of*  
22 *eyewitness identification procedures indicate that the criminal*  
23 *justice system can improve the accuracy of eyewitness*  
24 *identifications by implementing changes to identification*  
25 *procedures.*

26 (c) *Improving the accuracy of eyewitness identifications will*  
27 *increase public trust in the criminal justice system, which, in*  
28 *turn, will increase the ability of law enforcement and prosecutors*  
29 *to convict the guilty and protect our communities.*

30 (d) *Policies and procedures such as those recommended by*  
31 *the National Institute of Justice and the California Commission*  
32 *on the Fair Administration of Justice are readily available and*  
33 *have proven effective in other jurisdictions.*

34 (e) *It is the intent of the Legislature that law enforcement*  
35 *officials adopt new adopt policies and procedures similar to*  
36 *those recommended by the National Institute of Justice and the*  
37 *California Commission on the Fair Administration of Justice in*  
38 *order to ensure that eyewitness identification procedures in*  
39 *California minimize the chance of misidentification of a suspect.*

(f) On or before July 1, 2007, the Department of Justice, *and the Commission on Peace Officers Standards and Training*, in conjunction with local law enforcement agencies, prosecutors, and defense attorneys, including representatives of the California District Attorneys Association, the California Public Defenders Association and the California Attorneys for Criminal Justice, shall develop guidelines for policies and procedures with respect to collection and handling of eyewitness evidence in criminal investigations by all law enforcement agencies operating in California. These guidelines shall be developed to ensure reliable and accurate suspect identifications *and shall be consistent with the recommendations of the California Commission on the Fair Administration of Justice*. All law enforcement agencies shall adopt the guidelines by December 31, 2007. ~~In order to ensure reliability and accuracy, the guidelines developed by the Department of Justice shall comply with, at a minimum, the following requirements:~~

~~(1) Prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness shall complete a standardized form describing the perpetrator of the offense.~~

~~(2) The investigator conducting the identification procedure shall be a person who is not aware of which person in the identification procedure is suspected as the perpetrator of the offense.~~

~~(A) Individuals and photos used in an identification procedure shall be presented sequentially, not simultaneously. However, when it is not practicable for the investigator to be a person who is not aware of which person in the identification procedure is suspected as the perpetrator of the offense, then the following shall apply:~~

~~(i) The lineup will be presented simultaneously, not sequentially.~~

~~(ii) The investigator will state in writing the reason that the presentation of the lineup was not made by a person who was not aware of which person in the identification procedure was suspected as the perpetrator of the offense.~~

~~(3) An eyewitness shall be instructed of the following, prior to any identification procedure:~~

1     ~~(A) The perpetrator may not be among the persons in~~  
2     ~~identification procedure.~~

3     ~~(B) The eyewitness should not feel compelled to make an~~  
4     ~~identification.~~

5     ~~(C) An identification or failure to make an identification will~~  
6     ~~not end the investigation.~~

7     ~~(4) If the identification procedure is being done sequentially,~~  
8     ~~rather than simultaneously, then, prior to the identification~~  
9     ~~procedure, an eyewitness shall also be instructed of all of the~~  
10    ~~following:~~

11    ~~(A) Each photograph or person shall be viewed one at a time.~~

12    ~~(B) The photographs or persons shall be displayed in random~~  
13    ~~order.~~

14    ~~(C) The photographs will be presented in shuffled envelopes.~~

15    ~~(D) The eyewitness should take as much time as needed in~~  
16    ~~making a decision about each photograph or person before~~  
17    ~~moving to the next one.~~

18    ~~(E) All photographs or persons will be shown to the~~  
19    ~~eyewitness, even if an identification is made before all have been~~  
20    ~~viewed.~~

21    ~~(5) An identification procedure shall be composed so that the~~  
22    ~~fillers generally fit the description of the person suspected as the~~  
23    ~~perpetrator and, in the case of a photo lineup, the photograph of~~  
24    ~~the person suspected as the perpetrator should resemble his or her~~  
25    ~~appearance at the time of the offense and does not unduly stand~~  
26    ~~out.~~

27    ~~(6) If the eyewitness has previously viewed an identification~~  
28    ~~procedure in connection with the identification of another person~~  
29    ~~suspected of involvement in the offense, the fillers in the lineup~~  
30    ~~in which the person suspected as the perpetrator participates shall~~  
31    ~~be different from the fillers used in any prior lineups.~~

32    ~~(7) At least eight fillers shall be included in a photo lineup and~~  
33    ~~at least four fillers shall be included in a live lineup, in addition~~  
34    ~~to the person suspected as the perpetrator.~~

35    ~~(8) In a photo lineup, no writings or information concerning~~  
36    ~~any previous arrest of the person suspected as the perpetrator~~  
37    ~~shall be visible to the eyewitness.~~

38    ~~(9) In a live lineup, any identification actions, such as~~  
39    ~~speaking or making gestures or other movements, shall be~~  
40    ~~performed by all lineup participants.~~

- 1     ~~(10) All live lineup participants shall be out of the view of the~~  
2     ~~eyewitness prior to the beginning of the identification procedure.~~  
3     ~~(11) Only one suspected perpetrator shall be included in any~~  
4     ~~identification procedure.~~  
5     ~~(12) All witnesses shall be separated when viewing an~~  
6     ~~identification procedure.~~  
7     ~~(13) Nothing shall be said to the eyewitness regarding the~~  
8     ~~position of the person suspected as the perpetrator during the~~  
9     ~~identification procedure.~~  
10    ~~(14) Nothing shall be said to the eyewitness that might~~  
11    ~~influence the eyewitness's selection of the person suspected as~~  
12    ~~the perpetrator.~~  
13    ~~(15) If the eyewitness identifies a person he or she believes to~~  
14    ~~be the perpetrator, all of the following shall apply:~~  
15    ~~(A) The investigator shall immediately inquire as to the~~  
16    ~~eyewitness's confidence level in the accuracy of the~~  
17    ~~identification.~~  
18    ~~(B) No information concerning the identified person shall be~~  
19    ~~given to the eyewitness prior to obtaining the eyewitness's~~  
20    ~~statement of confidence level.~~  
21    ~~(16) A written record of the identification procedure shall be~~  
22    ~~made that includes, at a minimum, all of the following:~~  
23    ~~(A) All identification and nonidentification results obtained~~  
24    ~~during the identification procedure, signed by the eyewitness.~~  
25    ~~(B) A statement of the eyewitness's own words regarding how~~  
26    ~~certain he or she is regarding the accuracy of his or her~~  
27    ~~identification, signed by the eyewitness.~~  
28    ~~(C) The names of all persons present at the identification~~  
29    ~~procedure.~~  
30    ~~(D) The date, time, and location of the identification~~  
31    ~~procedure.~~  
32    ~~(E) If the identification procedure was conducted sequentially,~~  
33    ~~the order in which the photographs or persons were displayed to~~  
34    ~~the eyewitness.~~  
35    ~~(F) Color copies of all photographs used in a photo lineup.~~  
36    ~~(G) Identification information and the sources of all~~  
37    ~~photographs used in a photo lineup.~~  
38    ~~(H) An electronic recording that includes both audio and~~  
39    ~~visual representations of the identification procedures that~~

1 includes all persons who participated in the live lineup and the  
2 reactions of the witnesses and the statements of the investigator.

3 (b) (1) Field showups of a suspect are unnecessarily  
4 suggestive and are disallowed, except under any of the following  
5 circumstances:

6 (A) The witness is gravely injured and may not survive to  
7 participate in an alternative procedure.

8 (B) (i) There is no probable cause for arrest without a field  
9 showup identification and only a single witness will be making  
10 the identification.

11 (ii) There is no probable cause for arrest without a field  
12 showup identification and there are multiple witnesses, however  
13 each witness shall be shown the suspect separately. The field  
14 showup shall cease when the first identification is made by a  
15 witness. All other identification procedures must be in  
16 compliance with subdivision (a) of this section.

17 (iii) If there is no probable cause for arrest without a field  
18 showup identification, the suspect shall be given the opportunity  
19 to waive probable cause for the arrest and accept a prompt  
20 identification procedure in compliance with this statute in lieu of  
21 a field showup. Evidence of the waiver is inadmissible and shall  
22 be immune from prosecutorial comment.

23 (2) Whenever practicable and safe, during a field showup a  
24 witness should view the suspect while the suspect is not  
25 restrained by handcuffs or an officer and while the suspect is not  
26 seated in the squad car.

27 (3) A field showup shall be electronically recorded, unless it is  
28 shown to have been impracticable.

29 (4) During the field showup, the eyewitness must make a  
30 contemporaneous signed statement or electronic recording  
31 regarding any identification.

32 (e) For purposes of this section, the following terms have the  
33 following meanings:

34 (1) "Eyewitness" means a person whose identification of  
35 another person may be relevant in a criminal investigation.

36 (2) "Photo lineup" means a procedure in which an array of  
37 photographs, including a photograph of the person suspected as  
38 the perpetrator of an offense and additional photographs of other  
39 persons not suspected of the offense, is displayed to an

1 eyewitness for the purpose of determining whether the  
2 eyewitness is able to identify the suspect as the perpetrator.

3 (3) “Live lineup” means a procedure in which a group of  
4 persons, including the person suspected as the perpetrator of an  
5 offense and other persons not suspected of the offense, is  
6 displayed to an eyewitness for the purpose of determining  
7 whether the eyewitness is able to identify the suspect as the  
8 perpetrator.

9 (4) “Investigator” means the person conducting the live or  
10 photo lineup.

11 (5) “Identification procedure” means either a photo lineup or a  
12 live lineup.

13 (6) “Filler” means either a person or a photograph of a person  
14 who is not suspected of an offense and is included in an  
15 identification procedure.

16 (7) A field showup means a presentation of a single suspect to  
17 a witness or witnesses.

18 (d) When an identification procedure is composed or  
19 conducted in violation any of the provisions of this statute, the  
20 admissibility of the eyewitness identification shall be presumed  
21 to create a danger of undue prejudice.

22 (1) If the eyewitness identification is admitted by the trial  
23 court, the court shall give the jury a limiting instruction regarding  
24 the reliability of the identification substantially similar to the  
25 following:

26 (2) Specific procedures are in place to increase the reliability  
27 of eyewitness identifications; jurors may consider evidence that  
28 police officers did not follow such procedures or failed to adopt  
29 such procedures when determining whether an eyewitness was  
30 mistaken in identifying the defendant as the perpetrator.

31 SEC. 4. Section 13519.10 is added to the Penal Code, to read:

32 13519.10. The Commission on Peace Officer Standards and  
33 Training shall implement, on or before January 1, 2008, a course  
34 or courses of instruction for the required training of all peace  
35 officers on the methods and technical aspects of the eyewitness  
36 identification practices and procedures referenced in Section  
37 686.3.

38 SEC. 5.

39 SEC. 3. If the Commission on State Mandates determines  
40 that this act contains costs mandated by the state, reimbursement



1 to local agencies and school districts for those costs shall be  
2 made pursuant to Part 7 (commencing with Section 17500) of  
3 Division 4 of Title 2 of the Government Code.

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